

him to temporary total disability benefits should the treating doctor restrict him from working.

The only issues before the Board on this appeal are:

1. Did claimant injure either his right ring finger or his right shoulder while working for respondent?
2. If so, did the Judge err by requiring claimant to present evidence that a surgeon is reasonably confident that right shoulder surgery would improve claimant's condition before the Judge will authorize that surgery?
3. Did the Judge err by failing to order the payment of temporary total disability benefits in the event claimant is taken off work by his authorized treating doctor?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The December 17, 2002 Preliminary Decision should be affirmed.

For preliminary hearing purposes, claimant has proven that it is more probably true than not that he injured his right ring finger and right shoulder on February 27, 2002, while working for respondent. Claimant described the accident as follows:

A. (Claimant) I was helping two other people lift a gable wall and I'm standing at the top part of it. The wall's going up one side, slips off the floor and all the weight came down on my right side, so I broke my finger and injured my shoulder.

. . . .

Q. (The Court) And when you were lifting it you had a hold of the top of the gable and somebody let it tip the wrong way?

A. (Claimant) Exactly. It [gable wall] was like about shoulder high on the left side and it started sliding off the floor and I'm on this side of the gable so it caught me underneath.¹

The gable wall weighed between 200 and 400 pounds. Shortly after the incident claimant left the work site and sought medical treatment at the Haskell Indian Health

¹ P.H. Trans. (July 11, 2002) at 5-6.

Center, which referred him to orthopedic surgeon Dr. Richard G. Wendt. Claimant saw Dr. Wendt on the day of the alleged accident and was diagnosed as having a subluxed and fractured right ring finger and a right shoulder strain.

This claim hinges on claimant's credibility. Claimant's alleged accident occurred within the first two hours of work on his first day in respondent's employment. The two coworkers who were working with claimant to raise the gable wall recall the wall slipping after a strap broke. But those two coworkers did not hear claimant complain of being injured after the incident. On the other hand, claimant testified that he advised one of the coworkers at the construction site that he had broken his finger. Nonetheless, claimant immediately left the job site and sought medical treatment for his alleged work-related injuries. That evening claimant telephoned respondent's owner and left a message that he had broken his finger at work.

Despite the testimony from coworkers Galen Black and Lanett Pelsor that they did not see claimant struck or pinned by the gable wall, the Judge found claimant's testimony credible and awarded him medical benefits. In making that determination, the Judge also carefully considered the medical reports of Dr. Wendt and Dr. Sergio Delgado, both of whom relate claimant's present need for medical treatment to the February 27, 2002 accident.

Dr. Wendt stated, in part:

As you know, Mr. Saumpty was injured in a work-related injury on 02/27/02. From my understanding, at that point in time, he was lifting up a wall and the wall landed against him or pulled on his arm in some fashion. He injured his right shoulder at that time and he also fractured and subluxed the PIP joint of his right ring finger. When initially seen I did have to reduce his ring finger subluxation in the office, and his finger was splinted for 3-4 weeks. In addition, he was complaining of right shoulder pain at that time and initially I did attempt to treat it in a conservative fashion.

. . . .

It would be my opinion, from the incident described by Mr. Saumpty, and the fact that this was a relatively significant injury and that it also fractured and subluxed the PIP joint of his right ring finger, that this incident either caused and/or at least aggravated the right shoulder injury. I am not clear on whether Mr. Saumpty had had any previous history of problems and/or injury to this right shoulder, but from what is described by me by the history, and also by the obvious trauma that occurred to his right upper extremity, it would only make sense that this injury did cause a rotator cuff tear to his right shoulder and he has had continued problems with it since. Since he has not improved, I would recommend surgical intervention

at this time. Again, I am basing this on the fact that I know of no other previous injury to his right shoulder, or any other physician visits that he may have had regarding this shoulder prior to this injury and seeing myself last February 2002.²

In turn, Dr. Delgado stated, in part:

Balancing all the possibilities described above, it is my opinion that Mr. Saumpty has a right rotator cuff tear, which needs additional treatment, particularly surgical repair, in order to avoid progression of his rotator cuff lesion in view of his occupation and need for use of his right arm for repetitive work activities and heavy lifting.

Unless a review of records of injuries sustained 5-6 years ago shows that the injury was to the right shoulder girdle musculature, as claimed by Mr. Saumpty and not related to his rotator cuff area, his right rotator cuff tear can be attributed 50% to his work with SM Construction and 50% to subsequent work activities as shown performed in the surveillance video reviewed.³

Based upon the present record, the Board agrees with the Judge and affirms the finding that on February 27, 2002, claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Accordingly, claimant is entitled to receive treatment for his right upper extremity injuries.

The Board notes that the Judge did not authorize right shoulder surgery as the Judge wants additional evidence on the question of whether that surgery would be reasonably necessary. That is the Judge's prerogative. Likewise, the Judge has the prerogative to require another preliminary hearing to determine whether an injured worker is entitled to receive temporary total disability benefits as claimant's medical treatment progresses. Consequently, as the Judge has not exceeded his jurisdiction in those matters, the issue concerning the control the Judge is exercising over the potential right shoulder surgery and the temporary total disability benefits is not subject to review by the Board from the preliminary hearing order.⁴

WHEREFORE, the Board affirms the December 17, 2002 Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

² P.H. Trans. (Dec. 12, 2002), Cl. Ex. 1.

³ P.H. Trans. (Dec. 12, 2002), Cl. Ex. 2.

⁴ See K.S.A. 44-534a and K.S.A. 2002 Supp. 44-551.

Dated this ____ day of April 2003.

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation